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IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 427

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE and RIORDAN J. A. ROETT, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONERS

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Opinions Below

The Circuit Court of Appeals affirmed without opinion (R. 111), the affirmance being reported in 163 F. 2d 828. The opinion of the District Court (R. 103-106) is reported in 70 Fed. Supp. 764.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered October 7, 1947 (R. 112). The petition for certiorari was filed November 5, 1947, and the writ was granted December 15, 1947. 333 U. S. . The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USCA, Sec. 347).

Appealability of Judgment

Appeal will lie in proceedings before indictment to suppress evidence illegally seized. Such proceedings are independent actions undertaken before institution of the criminal case as such. *Go-Bart Importing Company* v. *United States*, 282 U. S. 344, 356; *Burdeau* v. *McDowell*, 256 U. S. 465; *Perlman* v. *United States*, 247 U. S. 7, 13. The appealability of the order was conceded by the Government in the Circuit Court of Appeals. On the application for certiorari the Government expressly called attention to the concession in the Court below and stated that they "do not press the point here" (Brief in Opp., p. 3, footnote 2).

Questions Presented

Whether revenue officers have power, despite the mandate of the Fourth Amendment, to act without search warrant under a situation in which the Government possessed full prior knowledge of the *corpus delicti*, opportunity to obtain the warrant and ample time within which to seek it.

Whether search and seizure in such circumstances are unconstitutional.

Constitutional Provisions, Rules of Criminal Procedure, and Statutes Involved

The Constitution:

The Fourth Amendment to the Constitution provides—

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment, insofar as pertinent, provides—

> No person * * * shall be compelled in any Criminal Case to be a witness against himself, * * *.

Arrest:

Rule 4 of Federal Rules of Criminal Procedure (1946), so far as pertinent here, provides that:

> Rule 4. Warrant or Summons upon Complaint.
>
> (a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. * * *

18 U. S. C. A., Sec. 53a (49 Stat. 877) provides in part:

> Any officer, agent or employee of the United States engaged in the enforcement of any law of the United States who * * * shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor * * *: Provided that nothing herein contained shall apply to any officer, agent, or employee of the United States serving a warrant of arrest, or arresting or attempting to arrest any person committing or attempting to commit an offense in the presence of such officer, agent or employee, or who has committed, or who is suspected on reasonable grounds of having committed, a felony.

Search and Seizure:

Rule 41 of Federal Rules of Criminal Procedure (1946), so far as pertinent here, provides that:

Rule 41. Search and Seizure.

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) * * *

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) * * *

(c) Issuance and Contents. * * *

(d) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. * * * The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. * * *

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court * * * for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant * * *.

In notes to Rule 41 the Advisory Committee have stated that the rule is a codification of existing law and practice, and that: Subdivision (a) is a restatement of existing law, 18 U. S. C. A., Sec. 611; Subdivision (b) is a restatement of existing law, 18 U. S. C. A., Sec. 612, but that the provision does not supersede or repeal special statutory provisions permitting the issuance of search war-

rants in specific circumstances; Subdivision (d) is a restatement of existing law, 18 U. S. C. A., Secs. 621-624; Subdivision (e) is a restatement of existing law and practice, 18 U. S. C. A., Secs. 625, 626, except that the motion must now be heard by the Court and not by the Commissioner.

In note to Subdivision (g) of Rule 41 the Committee cite special statutory provisions, still preserved, permitting searches and seizures in specific situations, among which are the following statutes pertinent to this case:

26 U. S. C. A., Internal Revenue Code, Sec. 3117:

> (a) Duties. * * * the Commissioner, his assistants, agents, and inspectors, may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, * * *. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in title XI of the Act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, Sections 611-633).

26 U. S. C. A., Internal Revenue Code, Sec. 3602:

The several Judges of the District Courts of the United States, and the United States Commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any Internal Revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the Revenue has been or is being committed upon or by use of the said premises.

26 U. S. C. A., Internal Revenue Code, Sec. 3116:

> It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall

> exist in any such liquor or property. A search warrant may issue as provided in title XI of the Act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, Sections 611-633) for the seizure of such liquor or property. * * *

Statutes violated by operation of illicit still:

In general, operation of an illicit still entails violation of the statutes following: 27 U. S. C. A., Sec. 203, engaging in the business of distilling distilled spirits without basic permit, a misdemeanor under Sec. 207 punishable by not more than $1,000 fine; Internal Revenue Code, Sec. 3173(b), evading taxes imposed under Sec. 2800(a), a misdemeanor punishable by fine or by imprisonment for not more than one year, or both; Internal Revenue Code, Sec. 2803(a), possession of distilled spirits without tax stamps affixed to the container, punishable under subsection (g) by fine or by imprisonment not exceeding 5 years, or both; Internal Revenue Code, Sec. 2810(a), possession, custody or control of an unregistered still, punishable by fine and by imprisonment for not less than one month nor more than 2 years; Internal Revenue Code, Sec. 2812(a), engaging in business of distiller without giving the statutory notice to Collector of the District, punishable by fine; Internal Revenue Code, Sec. 2814(a), failure or refusal to give notice and distiller's bond, punishable by fine and by imprisonment for not less than six months nor more than 2 years; and Internal Revenue Code, Sec. 2833(a), engaging in or carrying on the business of a distiller without giving bond or with intent to defraud the United States of the tax on spirits distilled, punishable by fine and by imprisonment for not less than 30 days nor more than 2 years.

The seven offenses set forth in the preceding paragraph were those charged against petitioners in the formal complaint on which they were arraigned before the Commissioner (R. 6-7). There was no charge of a conspiracy under

18 U. S. C. A., Sec. 88, an offense punishable by fine or by imprisonment for not more than 2 years, or both, and there was no charge of violating the statute on industrial alcohol, Internal Revenue Code, Sec. 3115, an offense punishable by a penalty of not exceeding $1,000 or by imprisonment not exceeding 30 days, or both, for a first offense.

The seven offenses charged by formal complaint against the petitioners comprise statutory felonies and misdemeanors: those carrying punishment by imprisonment for a term exceeding one year are felonies, and those providing lesser penalties are misdemeanors. 18 U. S. C. A., Sec. 541.

New Jersey Constitution:

At time of arrest the 1844 Constitution of New Jersey was in effect. Under the Bill of Rights in that constitution it was provided that:

> Art. 1, Para. 6. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized. (N. J. S. A., Constitution, p. 162.)

The 1947 Constitution of New Jersey, effective January 1, 1948, re-enacted the same provision in Art. 1, Para. 7, unchanged with a single minor exception: the word "but" was altered to "except."

New Jersey Alcoholic Beverage Control Law:

R. S. 33:2-3. Seizure of unregistered stills; search warrant; arrest of offenders:

> Any officer knowing or having reasonable cause to believe that any still or distilling apparatus or any parts thereof constitute such unlawful property,

it shall be his duty to investigate, under proper search warrant when necessary, which it shall be his further duty to apply for, and to seize such still or distilling apparatus or parts thereof, together with all articles, implements or paraphernalia used or adaptable for use in connection therewith and all personal property of whatsoever kind, found in a building or in any yard or inclosure connected with a building or on the premises in which such still or distilling apparatus or parts thereof are found, and to arrest all persons whom he shall know, or have reasonable ground to believe, are committing, or have committed, a misdemeanor under this chapter, and to make complaint against such persons as in other cases of misdemeanors. * * * [N. J. S. A. (1937)—P. L. 1934, c. 84, s. 3, p. 216, as am. by P. L. 1935, c. 255, s. 3, p. 782.]

33: 1-65: Search without warrant; misdemeanor.

Any person who shall intentionally search any private dwelling occupied exclusively for dwelling purposes, without a warrant therefor, or who shall maliciously and without probable cause, and without a warrant therefor, search any other building, premises, vehicle or place, shall be guilty of a misdemeanor [N. J. S. A. (1937); P. L. 1933, c. 436, s. 63, p. 1217.]

Statement

After arrest, but before indictment, petitioners applied to the District Court under Rule 41(e) of the Rules of Criminal Procedure (1946) for return of property taken and suppression of evidence on the ground that the same had been seized unlawfully without warrant (R. 2-4). This is the practice sanctioned by precedent and the new rules. *In re Fried*, C. C. A. 2, 161 F. 2d 453, 458, note 1 collecting the cases. In proceedings involving property in part contraband, which cannot be returned, the purpose and effect of the motion is to secure return of non-contraband and restraint against use as evidence of the contraband seized.

The motion was for return of "all papers, records and documents and other property seized * * * and all still equipment, mash, alcohol, and other property seized" and for restraint against "the United States Attorney * * * and the Agents of the Alcohol Tax Unit * * *" from using the aforesaid property, matters and things in any trial or hearing; and any information directly or indirectly obtained therefrom and by means thereof," and for "such other and further relief as may be just and proper" (R. 2).

Under Rule 41(e) it is provided that the motion to suppress "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds of the motion, but the court in its discretion may entertain the motion at the trial or hearing." It is plain from the precedents and the rule that such a motion is a favored one in aid of the rights granted under the Fourth Amendment and, like the Amendment, is to be liberally construed lest those rights be impaired.

At the hearing on the motion, petitioners offered in evidence the record of the preliminary examination before the United States Commissioner taken at Asbury Park, in the county in which search and seizure had been effected (R. 4-93); the Government submitted affidavits of the 3 agents who had taken part in the seizure (R. 93-103), together with affidavit of Nilson, secret agent of the Alcohol Tax Unit of the Treasury Department.

The District Court held that the search and seizure met the constitutional test of reasonableness and denied the motion to suppress (R. 103-106). Upon appeal the Circuit Court of Appeals affirmed (R. 111-112) without opinion. Meanwhile petitioners have been indicted and the prosecution is pending.

This Court allowed certiorari to four petitioners. After allowance of the writ, and before argument, petitioner Anthony Antoniole died.

In the Courts below and here on the application for certiorari the Government did not claim that circumstances prevented the obtaining of a warrant, but offered as sole justification the statement that a crime was being committed in the presence of the revenue officers for which reason search and seizure were said to be proper as incident to a lawful arrest on view. On their part the petitioners showed, entirely without any attempt at contradiction by the Government, that the Treasury Department officials and agents possessed full prior knowledge of the continuing *corpus delicti* incident to operation of an illicit still, had opportunity to obtain warrant from the judiciary and ample time within which to seek it, but deliberately had refrained from obtaining a warrant; the petitioners maintained below and maintain here that for such nonfeasance the acts of the revenue officers were unreasonable and in violation of the Fourth and Fifth Amendments.

The evidence before the District Court came entirely from the government officers and from Kell, the informer. It was not in conflict and showed the following facts:

In January, 1946, petitioners sought to lease part of the Kell farm located in Allenwood, Wall Township, Monmouth County, New Jersey. Kell, suspicious of their motives, reported the matter to the Government and was permitted to accept the offer provided he would cooperate with the Treasury Department and keep the Government informed of all developments (R. 65-68; 71-73; 78-82). Mr. Gettel, Investigator-in-charge of the Alcohol Tax Unit of the Treasury Department, admitted under oath that: "I told him that if he did so and wanted to work with the Government that the Government would be with him" (R. 66). In mid-February the Government arranged with Kell to receive Alcohol Tax Unit Investigator Nilson on the farm in the disguise of a farm hand, whereupon Nilson appeared on the premises and performed farming operations for Kell until June 3, the date of the raid (R. 37;

83-86; 97). Toward the end of March Kell leased (R. 77; 86) part of his farm to petitioners for $300. a month and introduced Nilson to them as a relation of Mrs. Kell. Under instruction of his superiors Nilson then became an employee of petitioners and, with Kell, assisted in erecting a house and still, accepting money for his labor and turning it over to the Government, at the same time keeping his superiors constantly informed concerning progress in erecting the still.

The still commenced to operate on May 13 and Nilson thereafter worked as "mash man" for $100. a week, assisting daily in operation of the plant and making prompt and frequent reports to his superiors in the Treasury Department (R. 43-47; 49-60; 95-96; 97-98). The Government permitted the still to be operated for three weeks, from May 13 to June 3, on which latter date the premises were raided. During this period Nilson assisted daily in the production of alcohol (R. 58-60). On May 20, Nilson personally conferred with his superiors and gave Investigator-in-charge Gettel samples of each run of alcohol, several sugar bags, a yeast wrapper and an empty five-gallon can which he had taken by stealth from the still premises (R. 96), the conference taking place at Laurelton, New Jersey, at the home of Nilson's father (R. 98). It was Nilson's habit to confer with his superiors at various places a number of miles from the Kell farm, in the course of which he met high officials, *i. e.*, the District Supervisor and the Assistant Supervisor in Charge of Enforcement, top officials of the Unit in the district (R. 95-96), and at these meetings the conversation "would be about the still building I had assisted in erecting or about the illicit distillery that I was working at on the Kell farm" (R. 96).

On May 20 the still had been in full operation for one week and, through Nilson, the Government was in complete possession of every detail of the case, including identity of the principals (R. 46). Thus on May 20 and thereafter,

if not before, the Government had ample evidence on which to apply for a warrant. It has never claimed otherwise. No warrant was sought (R. 12; 63).

On May 26 a two-way portable radio set was dispatched to Nilson by his superiors and was delivered by Investigator Casey. Nilson used the apparatus to transmit frequent bulletins to the Alcohol Tax Unit (R. 98). Again no warrant was applied for, although the evidence in possession of the Government was more than ample to permit seeking one. On May 31, on radio intelligence supplied by Nilson, a motor vehicle loaded with 94 five-gallon cans of alcohol was seized by the Unit at Newark, New Jersey, about an hour after it had left the farm; the driver was arrested (R. 94; 96; 99).

The seizure of truck and alcohol took place some 76 hours before the raid, yet in all the intervening time the Government made no effort to obtain a warrant. The Alcohol Tax Unit operates out of Newark, in which city District Court judges sit daily and a United States Commissioner is always available; another is available at Asbury Park, Monmouth County, less than a half hour drive from the Kell farm. Future events disclosed that the revenue officers never intended to obey the mandate of the Fourth Amendment and that they purposed to act without putting the matter before the judicial department. There could have been no difficuly in obtaining the warrant, the evidence being in possession of the Government, but again the Government deliberately avoided seeking one.

On June 3 Nilson radioed that two of the principals were at the still and that a load of sugar was due to arrive (R. 96; 99). Nilson knew then that the raid would be made that night, for he told Kell that "tonight is the night" (R. 91). The raid took place shortly before midnight, entirely without warrant, although one could easily have been obtained. Indeed, the drama of the midnight descent

of the revenue men on the still would have been perfectly possible and lawful under a nighttime warrant, for the Government had positive evidence that still, mash and equipment were in the place to be searched. Rule 41(c) Federal Rules of Criminal Procedure (1946); 18 U. S. C. A., Sec. 620.

The actual raid was carefully planned by the Tax Unit and was well executed by very skillful officers who, tongue-in-cheek, claimed that the odor of mash and noise of machinery led them to suspect operation of a still and that, through an open door of the still house, the still was seen, fires banked, while Antoniole was in the building (R. 10-11). Arrest of Antoniole then was made, the search was undertaken and turned up still, mash, machinery, alcohol, cans and equipment.

Initially the raid did not net the other petitioners. They were apprehended later the same night. The record shows that Trupiano and Riccardelli were arrested by Investigators Dell and Fox and brought to the premises after the seizure (R. 9). The record is silent as to circumstances of their arrest. (Trupiano and Riccardelli state that they had gone to bed in their dwelling at Spring Lake, 6 or 7 miles from the still house, at about 11:30 P. M. Between 1:30 and 1:45 A. M. Fox and Dell, forcing way past the landlady, entered the room where the 2 petitioners were sleeping, pulled them out of bed, searched the room, searched them, compelled them to dress, arrested and brought them to the still, not telling them why they had been arrested. *Cf.* The Waste Dealer's Case, *Christie* v. *Leachinsky*, 1 All Eng. L. Rep. 567, at p. 572-573, 575-576, 578-580, on unlawfulness of arrest made without announced reason.) Roett was placed under arrest as he approached the scene after Antoniole's arrest and after the seizure had been made (R. 95; 101). The raid took place between 11:30 and 11:45 P. M. (R. 12) and the seizure was made immediately after arrest of Antoniole (R. 103). The revenue officers had

neither warrant to arrest nor one to search (R. 12); this fact was conceded by the Government on the application for certiorari.

An automobile truck standing in front of the still house was also searched "thoroughly for papers and things of an evidenciary nature" (R. 100). The Government admitted that the petitioners were also searched (R. 9) but did not disclose the objects taken. (Roett states that he was searched by Investigators Casey and Van de Car and that they took from him: his wallet, some $300. in cash from his pocket, personal papers, and records of expenses, all of which the Government still retains except the cash which has been returned; he also states that Van de Car searched Antoniole and took some $10. or thereabouts in cash, some personal effects, and a notebook said to contain record of receipts and events.) The raid was made by Gettel, Van de Car and Casey and prior thereto the agents did not see Trupiano, Riccardelli or Roett on the scene (R. 25).

The raid was planned to appear as one necessarily made without warrant to arrest or search, but the facts show that the elaborate actions of the raiding party were mere deception amounting to nothing more than self-serving declarations designed to simulate an emergent arrest necessarily made without warrant and to give to an utterly lawless act the appearance of legal innocence.

Thus during the preliminary examination before the commissioner, Investigator Van de Car testified on direct that a strong odor of fermenting mash, the sound of a motor in operation and the sight of the still led him to act (R. 7-8). Cross examination failing to bring out the entire story the agent was called as a defense witness and this resulted in eliciting the fact that Van de Car knew about the still on the Kell farm "a couple of weeks previous to the raid" (R. 26) and that Investigator-in-charge Gettel

know it also (R. 27). The same procedure had to be gone through with Nilson: on direct he confined his testimony to the night of the raid and it required cross examination to unearth the Government secret (R. 42-49) in part, and calling him as a defense witness to bring out the whole tale (R. 49-60). Nothing pertinent was obtained from Mr. Gettel on direct or cross (R. 61-62) and he, too, had to be called as a defense witness. This brought out the details of the secret (R. 62-70). The Government did not call the informer, Kell, but the petitioners did and this resulted in more light thrown on the intimate details of the Government's actions (R. 70-93).

The Government agents were less than frank concerning the true facts surrounding the raid, and these facts had to be extracted from them on the witness stand item by item. Eight months later they made affidavits for the record and, making virtue of necessity, admitted that they had known all about the still long in advance of the raid. Thus Van de Car admitted in his affidavit that he had visited Nilson two nights before the raid and had spoken with him about the still and the seizure, the day before the conversation, of the truck and alcohol at Newark (R. 102); Casey admitted that he had been working on the case for months, that he was the Unit's contact man with Nilson, that he had visited the Kell farm and had also met Nilson 3 or 4 times a week for a number of months at which times the two men "discussed the operations that were going on at said farm and the work he (Nilson) was doing," and that he had relayed the radioed information from Nilson which had resulted in seizure of truck, alcohol and driver at Newark on May 31 (R. 93-94). Gettel, the Investigator-in-charge, gave all the details in his affidavit and volunteered the information that he had searched "thoroughly for papers and things of an evidentiary nature" the automobile truck standing in front of the still house (R. 97-101). In this fashion the Government be-

latedly admitted facts showing that it had staged an allegedly emergent raid, arrest, search and seizure, but that the "emergency" had been mere protective coloration designed to conceal *scienter* and thereby to justify failure to obtain the warrant of the judicial department for the acts of the revenue agents.

The District Court saw nothing unconstitutional in the foregoing method of waging war on crime. He applied the familiar rule that no warrant is required to arrest on view and that search and seizure in such circumstances are not unreasonable. This rule is merely an exception to the broad rule that search and seizure without warrant are unlawful, but the effect of the decision is to make the exception the broad rule and to nullify much of the protection intended by the Fourth Amendment. Justification for the ruling must be found in what the Court said: "The government agents herein were not pressed for time but we do not think that their failure to procure a search warrant during this period requires suppression of the evidence they found. They were drawn to the scene of the alleged crime by one of their own number allegedly working with the suspects. This was good police work and efficient crime detection" and there was "no fracture of the defendant's constitutional privileges" (R. 106).

Specifications of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding that revenue officers have power, despite the mandate of the Fourth Amendment, to act without warrant under a situation in which the Government possessed full prior knowledge of the *corpus delicti*, opportunity to obtain the warrant and ample time within which to seek it.

2. In holding that an arrest and search, made on view without warrant and without any necessity, real or ap-

parent, for such summary action is not in violation of the Constitution, Fourth and Fifth Amendments.

3. In holding that the constitutional rights of the petitioners were not, in this case, infringed upon by action without warrant.

4. In affirming instead of reversing the judgment of the District Court dismissing the petition for return of property and suppression of evidence.

Summary of Argument

The facts and circumstances of this case sum up to an unreasonable search and seizure violative of the Fourth Amendment. This is so both as to the contraband seized the night of the raid and as to evidence secretly abstracted by the undercover agent and turned over to the Government before the raid.

I

When seizure is made in violation of the Amendment the fruits of the unlawful search will not sustain a conviction. Evidence so obtained must be returned or suppressed. Search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success. The Court will protect the citizen's rights under the Fourth Amendment as of the very essence of constitutional liberty. The Amendment is to be construed liberally, to the end that every man shall receive every right afforded to him. It is beneath the dignity of a free people to tolerate law enforcement grounded in violation of the basic law. Officers who violate the Amendment will lose fruits of their zeal. It is only unreasonable searches and seizures which violate the Amendment, but

on the facts and circumstances of this case the unreasonableness of the seizures clearly appears.

II

A. Evidence seized on night of raid.

The Government possessed ample prior knowledge, time and opportunity to obtain warrants and, under the facts and circumstances of this case, its refusal to proceed by warrant and its actions without warrant were unreasonable. The arrests and seizures were not justified under federal law and were not justifiable under the laws of the State of New Jersey. *Taylor* v. *United States* is controlling or points the way toward decision for petitioners. Conflict on the point between 2nd and 3rd circuit decisions must be resolved by this Court. The evidence amounts to fruit of an unlawful search and seizure and must be suppressed. The Amendment did not hamper proper law enforcement in this case and even if it did the policy fixed by the forefathers against a too permeating police surveillance would have to prevail.

B. Evidence secretly abstracted and turned over to the Government.

The evidence secretly abstracted by the undercover agent, Nilson, is the fruit of an unlawful seizure and must be suppressed. *Gouled* v. *United States* is controlling.

Argument

The facts of this case are simple. The Government placed an undercover agent on a farm in disguise of a farm hand. It then permitted the farmer to lease part of his farm for erection and operation of an illicit still, on his promise to cooperate with the Government, giving express

assurance that if the farmer worked with the Government it "would be with him." With the active help of the farmer and the secret agent a still house was built and the still and equipment installed. The secret agent then worked for the distillers as "mashman" for pay and assisted in production of alcohol, at the same time making his reports to the Government. He secretly abstracted evidence and turned it over to his superiors. The Government permitted the still to operate for 3 weeks and then raided it without warrant. Although the Government had ample knowledge, time and opportunity to obtain a warrant it declined so to do. Entirely without warrant it arrested one of the petitioners, then seized still and equipment, and thereafter arrested the remaining 3 petitioners.

We believe that the evidence secretly taken by the undercover agent and turned over to the Government was seized in violation of the Fourth and Fifth Amendments, and that refusal of the Government to obtain warrant of the judicial department before springing the trap on petitioners was unreasonable and in violation of the same amendments and the decisions of this Court.

I

Unlawful search and seizure in violation of the Constitution, Fourth and Fifth Amendments.

When a seizure is made in violation of the Fourth Amendment, a conviction based upon evidence so obtained cannot be sustained. *Boyd* v. *United States*, 116 U. S. 616; *Weeks* v. *United States*, 232 U. S. 383; *Agnello* v. *United States*, 269 U. S. 20; *Harris* v. *United States*, 331 U. S. 145, 150; *United States* v. *Di Re*, 333 U. S. ——.

Evidence obtained in violation of the amendment must be returned. *Weeks* v. *United States, supra* at page 398. Such evidence must be suppressed and the Government

enjoined from using it. *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358; *United States* v. *Lefkowitz*, 285 U. S. 452; Rule 41(e), Rules of Crim. Proc. (1946).

A search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success. *United States* v. *Di Re*, 333 U. S. ——; *Byars* v. *United States*, 273 U. S. 28. Most unlawful searches result in seizure of contraband or incriminating evidence of some type; if result could justify means employed the amendment would be reduced to a form of words.

The analysis accompanying dissenting opinion in the *Harris* case, 331 U. S. at pages 175-181, makes available for ready reference the decisions of this Court on search and seizure from the *Weeks* case down to last year. In addition the important decisions of the Court down to 1921 and 1922 are analyzed in two available articles: Fraenkel, "*Concerning Searches and Seizures*," 34 Harvard L. Rev. 361-387; Chafee, "*The Progress of the Law*, 1919-1922," 35 Harvard L. Rev. 694-704. Others have added to the literature on the subject, but the best source being in the decisions of the Court it is upon the decisions that we rely.

For the Court it was said in the *Harris* case that it "has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '* * * are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen * * *'. Gouled v. United States, 1921, 255 U. S. 298, 304." *Harris* v. *United States*, 331 U. S. 145, 150. In January of the present year, in sustaining reversal of the *Di Re* conviction, the Court demonstrated that every attempt to deprive the citizen of his rights under the Fourth and Fifth Amendment would be struck down.

The Court never forgets that it is interpreting a Constitution. No narrow rules of construction are indulged in. "The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be an impairment of the rights for the protection of which it was adopted." *Go-Bart Co.* v. *United States*, 282 U. S. 344, 357.; *cf. United States* v. *Lefkowitz*, 285 U. S. 452, 464; *Grau* v. *United States*, 287 U. S. 124, 128; *Sgro* v. *United States*, 287 U. S. 206, 210.

That appeal to this Court is oftener made by a violator than by the law-abiding does not and must not influence the result. The Court must and does insist that every man shall receive every right afforded to him by the Amendment; when it perceives that an unconstitutional seizure has been made in violation of those rights it must and will give relief to all.

Persons suspected of defrauding the revenues by manufacture of alcohol without payment of tax do not, because of that suspicion, lose the protection of the Amendment. They have every right to complain of infringement, not only because the Constitution affords refuge in such complaint but because it is beneath the dignity of a free people to tolerate law enforcement grounded in violation of the basic law. That a generous policy permits complaint on the part of unsavory persons for violation of constitutional rights is because a great people insist that it be that way. There are rules of war applicable to the fight upon crime, the first of which is that officers must keep within constitutional bounds; when these rules are violated the officers will lose the fruits of their zeal.

The amendment denounces "unreasonable searches and seizures" and it is held that "it is only unreasonable searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its

own facts and circumstances.' Go-Bart Importing Company v. United States, 1931, 282 U. S. 344, 357." *Harris* v. *United States*, 331 U. S. 145, 150.

We now proceed to demonstrate the unreasonableness of the seizures on the facts and circumstances of our case.

II

Under facts and circumstances of the case, the seizures were unreasonable and unconstitutional.

No warrant was employed by the Government, either as a *capias* or to search, and the seizures were of 2 types: (1) still, mash, papers, &c., seized openly on night of the raid; (2) evidence stealthily abstracted by a secret agent of the Government. Rules differ as to each type of seizure and, for such reason, argument is separately addressed to each.

A. Evidence seized on night of raid.

On June 3, shortly before midnight, the still was raided by 3 revenue agents, entirely without warrant and pursuant to plan. Antoniole was arrested in the still house, whereupon still, mash and equipment were seized. Later that same night the remaining 3 petitioners were placed under arrest, brought to the still house, searched, and arraigned the next morning, these arrests taking place after the seizure.

The Government seeks to justify seizures as incidental to lawful arrest. *Harris* v. *United States*, 331 U. S. 145, 151. Petitioners assert that under facts and circumstances of this case arrest and seizure without warrant were unreasonable and violative of Fourth and Fifth Amendments.

The argument for the Government ignores the effect of the all-important secret activities of the revenue officers and long prior knowledge of the continuing *corpus delicti*,

which activities and knowledge permitted, and demanded, recourse to the orderly processes provided by law for arrest and search, *i. e.*, warrant to arrest under Rule 4 and to search under Rule 41.

It would have been very easy for the Government to have obtained warrants to arrest under Rule 4 and to search under Rule 41. Ample knowledge, time and opportunity existed therefor. The still commenced to operate on May 13 and the raid occurred 3 weeks later. Any agent of the Unit might have applied for the warrants and either Nilson, the secret agent, or farmer Kell, the collaborator, could have made the affidavit establishing grounds for issuance. Neither was restrained of liberty, each came and went at will, and a United States Commissioner was located in Asbury Park, only a short drive from the scene. Even a nighttime raid would have been possible under warrant, for either Nilson or Kell could have made positive affidavit that the contraband property was in the place to be searched. Rule 41(c). Thus it is seen that existence of the Fourth Amendment did not, in any way, hamper enforcement action if undertaken in the usual orderly manner.

Constitutional rights "against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392.

Long ago, in the *Carroll* case it was said for the Court by TAFT, *C. J.*, that: "In cases where the securing of a warrant is reasonably practical, it must be used * * *." *Carroll* v. *United States*, 267 U. S. 132, 156. The quoted dictum became law in the *Taylor* case, wherein for this Court it was held: "Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even

after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure the warrant. Moreover, a short period of watching would have prevented any such possibility. We think, in any view, the action of the agents (in searching an unoccupied garage) was inexcusable and the seizure was unreasonable. The evidence was obtained unlawfully and should have been suppressed. See Carroll v. United States, 267 U. S. 132; United States v. Lefkowitz, 285 U. S. 452, and cases there cited." *Taylor* v. *United States*, 286 U. S. 1, 6.

The rule in the *Taylor* case is applied in the 2nd circuit with vigor. Where it is reasonably practical to obtain warrants they must be used. In the *Kaplan* case, in reversing a conviction based upon an arrest and seizure of a still after agents had smelled fermenting mash, and speaking for the Circuit Court of Appeals, Judge LEARNED HAND said: "We are told that unless such evidence will serve, it will be impossible to suppress an evil of large proportions in the residential part of Brooklyn. Perhaps so; any community must choose between impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution. But the danger is not certain, for the officers could have applied for a warrant which—as was at least intimated in *Taylor* v. *United States*—might then have been valid. It takes time to break up a still and take the parts away; if the attempt were made, it would discover itself immediately. One or more officers could have watched, while the others went to a judge or commissioner, whose action would at least put a different face upon their subsequent proceedings." *United States* v. *Kaplan*, C. C. A. 2, 89 F. 2d 869, 871.

In the same circuit, in the *Edelson* case the same principle was applied. There, without warrant, federal officers called in by baffled state enforcers broke down a partition and discovered a plant for cleaning denatured alcohol.

In reversing the order below, and ordering suppression of evidence, the Court said: "Under the circumstances disclosed, the search was unreasonable and illegal. It was not made pursuant to a search warrant, although there was ample time to secure one if adequate cause existed for issuing it." *United States* v. *Edelson*. C. C. A. 2, 83 F. 2d 404, 405. The same principle was asserted in the *Milburne* case, but did not have to be followed because federal men had not participated in the search. *In re Milburne*, C. C. A. 2, 77 F. 2d 310, 311. In the 3rd Circuit a different rule prevails and this Court must resolve the conflict.

In the present cause the District Court did not follow the principle of the *Taylor* case, asserting a distinction said to arise out of the fact that in the cited case there was no arrest, while here there was one. We deem the distinction more illusory than real: assuming that necessity to arrest on view will make reasonable a seizure without warrant, there was in this case no necessity, real or apparent; therefore the constitutional principle of the *Taylor* case must be followed here, the entire absence of any necessity to act without warrant being fully equivalent to the absence of an arrest in the cited case.

The overriding reason for the *Taylor* decision was lack of excuse for ignoring the usual and orderly mode of procedure by warrant, the lack being pointed up by absence of anyone requiring to be arrested; in the present case similar lack of excuse appears from the facts. In the cited case the act was wrong because unnecessary and it was wrong in this case, too, for the same reason. The true test, it seems to us, is not presence or absence of an arrestee, but of any reasonably apparent need for summary action. That is the teaching of the *Taylor* case and the District Court erred in perceiving a distinction of form only and holding it to be one of substance. Thus the *Taylor* holding either controls the present cause, or points the way toward decision for the petitioners.

We see no substantial difference between what was held to be unlawful in the *Silverthorne* case and what was done in this cause. There a clever method had been devised to circumvent the Amendment under color of law, but this Court scotched the attempt; the Government could not derive an advantage from its own wrong and to permit evasion of the Amendment would be to reduce it to a "form of words." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392. In the present case an alleged arrest on view was staged, in order to give color to claim that summary action was required, and thereby the protection of the Amendment was sought to be taken away. If this be lawful the protection of Fourth and Fifth Amendments will be reduced to form of words. The advantage to the Government in avoiding use of a warrant is obvious: a search and seizure made without warrant cannot be held defective by reason of inartificial preparation of the supporting affidavits or the warrant itself. If the Government can so proceed, few warrants will ever be sought and thus the protection intended by the Amendment will be seriously diluted.

The *Harris* case, decided last term by divided vote, does not, as we read the majority opinion, do more than say that if the Government proceeds in absolute good faith it may have the benefit of an incidental search. If the investigators had known of the existence of the draft cards secreted in the drawer and had devised an arrest under mail fraud warrant in order to search for the cards, it is not likely that the position of the Government could have found any support in the Court. On the issue of good faith the *Harris* case went the way it did, but in the present case the facts show entire lack of good faith: here the Government knew all along about the still, its agents helped to erect and operate it, and its investigators knew what they were going to find before the raid was made. On such a showing the Government cannot spell out of the *Harris* case any support for its present position.

The Fourth Amendment secures not only houses, papers and effects against unreasonable search and seizure, but also *persons*. Not only were search and seizures unlawful, but also arrest of the persons themselves. The right of the citizen to complain of an unlawful search and seizure of his property without warrant is not all the amendment grants: he has the same right to complain of arrest without warrant when one may easily be obtained. Thus arrest, search and seizures under the circumstances of this case were unreasonable and unconstitutional.

Search and seizure were made on the basis of arrest of Antoniole in the still house. At that time none of the remaining 3 petitioners was seen at the premises by the agents who made the raid. The seizure was over before they were apprehended (R. 25; 94-95). At the time the seizure of the still was made none of the raiding party even saw Trupiano, Riccardelli or Roett. Therefore, as to the 3 petitioners Trupiano, Riccardelli and Roett the search and seizure, completed before their arrest, cannot be said to be incidental to arrest.

In assuming for themselves the right to arrest without warrant under the peculiar facts and circumstances of this case, the Alcohol Tax Unit claim a power that Congress has denied to the Federal Bureau of Investigation, members of which cannot arrest without warrant except "where there is a likelihood of the person escaping before a warrant can be obtained for his arrest." 5 U. S. C. A., Sec. 300a. Such restriction on so important a law enforcing group as the Bureau of Investigation indicates congressional intent to compel officers to obtain license of the judicial department before arresting, unless time will not permit. It is true that marshals and their deputies have been given great powers to arrest without warrant, 28 U. S. C. A., Sec. 504(a), but Congress has not seen fit to clothe revenue agents with the same power.

It is significant that revenue officers, who protect the public purse against acts merely *malum prohibitum* rather than *malum in se*, have been limited to the ordinary and normal processes of the law: they may "swear out warrants" (26 U. S. C. A., Int. Rev. Code, Sec. 3117) and obtain search warrants (26 U. S. C. A., Int. Rev. Code, Secs. 3116, 3602). Congress has given them no specific authority to do otherwise.

There is no general federal rule for arrest without warrant. *United States* v. *Di Re*, 333 U. S. —— (p. 9 of opinion). Nor do we think the existence of exemption from criminal punishment now found in 18 U. S. C. A., Sec. 53(a), and applicable to arrest on view or to felony, actual or suspected, can be construed to provide a general federal rule for arrest without warrant. The cited statute discloses merely a congressional intent to relieve officers from possible criminal prosecution for acts done in heat of the chase, a perfectly proper piece of legislation which Congress could lawfully enact and the President approve; but if the same statute intended to make lawful an unreasonable seizure of the person it would be violative of the Fourth Amendment and unconstitutional.

Ordinarily when officers stumble over crime or encounter a suspected felon they must act swiftly or lose the quarry. For such reason the Fourth Amendment does not forbid summary action. There are cases, however, such as the present one, in which the nonfeasance of the officers is deliberate and carefully calculated to evade the Amendment, ample knowledge, time and opportunity existing for application to be made to the judicial department, and in such cases seizure of person or property without warrant will be unreasonable and unconstitutional. In such a situation exemption from criminal punishment under 18 U. S. C. A., Sec. 53(a) could not constitutionally excuse violation of the citizen's rights under the Fourth Amendment; perhaps the officer could not be punished criminally

for his act, but that act would, nevertheless, result in unconstitutional seizure under the Amendment and the evidence would have to be suppressed.

Testing the actions of the Tax Unit under the laws of New Jersey, *United States* v. *Di Re*, 333 U. S. ——— (p. 8 of opinion), does not result in any improvement in the position of the Government. Assuming, but not conceding, that a state law permits certain acts which, when performed by federal officers, violate the Fourth Amendment, we are still confronted by the fact that those same acts are unconstitutional under the Amendment and the evidence would have to be suppressed; the federal Constitution is the supreme law of the land and the state laws are not. However, we think the New Jersey laws do not permit the acts committed in this case.

In New Jersey constitutional protection against unreasonable seizure of person or property is almost identical in language with the Fourth Amendment (N. J. Const. 1844, Art. 1, para. 6; N. J. Const. 1947, Art. 1, para. 7). Under the Revised Statutes of New Jersey (1937) special statutory provision is made for seizure of illicit stills and arrest of persons concerned with them. The cited statute lays down the procedure to be followed: "* * * it shall be his duty to investigate, under proper search warrant when necessary, which it shall be his further duty to apply for, and to seize such still * * * and all personal property of whatsoever kind, found in a building or in any yard or inclosure connected with a building or on the premises * * *, and to arrest all persons whom he shall know, or have reasonable cause to believe, are committing, or have committed, a misdemeanor under this chapter, and to make complaint against such persons as in other cases of misdemeanors. * * *" *R. S. 33: 2-3.* It is thus seen that, in New Jersey, the laws require use of search warrant in the present case and that such warrant by express enactment of law confers the right of arrest incidental to search. This

is exactly opposite to the federal rule permitting search incidental to arrest, and discloses an intent on the part of the lawmaker to forbid search incidental to arrest and to require that the search be first authorized by the judiciary and arrest be an incident to judicial action permitting the search.

A New Jersey officer will, under the cited statute, need a warrant under the facts and circumstances of this case showing aid in erection of the still and still house rendered by a government agent and a collaborator and ample prior knowledge, time and opportunity to obtain the warrant. Under the State's "Fourth's Amendment" action without search warrant would amount to unreasonable search and seizure and for such reason a proper search warrant would be necessary and it would be the duty of the officer to apply for it, under the statute cited in the preceding paragraph. Otherwise the officer would incur criminal prosecution under the statute absolutely forbidding search of a dwelling without warrant and extending special protection to other property in these words: "* * * or who shall maliciously and without probable cause, and without a warrant therefor, search any other building, premises, vehicle or place, shall be guilty of a misdemeanor." *R. S. 33:1-65.*

Not only were the acts of the revenue officers unlawful under federal law. They were similarly unlawful under New Jersey law. In the *Di Re* case the Government maintained that the actions without warrant were necessitous, but this Court held that necessity could not justify the arrest and search. In the present case, so far at least, the Government has not made an appeal to necessity to justify its actions here.

The actions of the revenue agents on the night of the raid were designed to spring the trap on petitioners and to conduct a general exploratory search to obtain evidence. They had more than enough evidence available through

Nilson, the secret agent, and farmer Kell, the collaborator, to obtain an indictment, a *capias* to arrest, a search warrant, or all three. The character of the search is indicated by admission of the investigator-in-charge that he "then returned to the truck and searched it thoroughly for papers and things of an evidentiary nature" (R. 100). The agent's quoted description accurately sums up the type of search undertaken; the revenue men were not really seeking instrumentalities or fruits of crime, but evidence to convict the petitioners.

To support their acts the revenue officers should have had warrants. "Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." *United States* v. *Lefkowitz*, 285 U. S. 452, 464.

If existence of the Fourth Amendment should hamper law enforcement unduly, the remedy is to repeal the Amendment and not to nullify it. In truth much of the complaint against the Amendment by officers is unfounded. Laws can be and are enforced daily without third degree or other unconstitutional acts, for there are few crimes that competent officers, willing to apply ability and energy to the task, can not ferret out in lawful fashion. The few unfound offenses may go unprosecuted without the country going to ruin, for in the words of Mr. Justice HOLMES, "we must consider the two objects of desire both of which we cannot have, and make up our minds which to choose." *Olmstead* v. *United States*, 277 U. S. 438, 470. In the words of Judge LEARNED HAND, "any community must choose between impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution." *United States* v. *Kaplan*, C. C. A. 2, 89 F. 2d 869, 871.

In the present case warrants were readily obtainable and proper law enforcement was entirely unhampered by

the Amendment. Even if the Fourth Amendment had hampered the revenue men, although it did not, it is to be remembered that "the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment." *United States* v. *Di Re*, 333 U. S. —— (p. 14 of opinion).

B. Evidence secretly abstracted and turned over to the Government.

The record discloses that on May 20 Nilson, the undercover agent disguised as a farm hand, conferred with his superiors and turned over to them samples of each run of alcohol, several sugar bags, a yeast wrapper and an empty five gallon can which he had secretly abstracted and removed from the premises (R. 96; 98). This seizure was neither under warrant nor in connection with an arrest. It is possible, and quite likely, that he repeated the process on later occasions; if he did so this also was without warrant or in connection with arrest.

The foregoing seizures are clearly unconstitutional and are controlled by the *Gouled* case in this Court. The cited case held that evidence secretly abstracted by an undercover agent of the Government is unlawfully seized, cannot be retained by the prosecution under Fourth and Fifth Amendments, and must be suppressed. *Gouled* v. *United States*, 255 U. S. 298, 306.

The pieces of evidence abstracted by stealth were the fruits of an unlawful search and seizure. They should have been returned on the motion to suppress and refusal of the lower Courts to order such return or suppression of evidence was erroneous.

The matter was ignored by the District Court although the evidence was before him. The opinion is completely

silent on the point but, the motion having included suppression or return of "all papers, records, documents and other property" (R. 2), the Court was legally obligated to grant suppression of the evidence secretly abstracted by the undercover investigator.

CONCLUSION

The actions of the Alcohol Tax Unit and its agents in making the seizures and arrests in this case entirely without warrant were, under the facts and circumstances of the case, unreasonable and in violation of Fourth and Fifth Amendments. The judgments of the Circuit Court of Appeals and the District Court should therefore be reversed, with instructions to suppress the evidence so seized.

Respectfully submitted,

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